Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

L.R.S.C. CO.,

Petitioner,

v.

RICKEL HOME CENTERS, INC. AND STAPLES, INC.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

WHETHER A SHOPPING CENTER LANDLORD CLAIMING THAT A LOWER TRIBUNAL EXCEEDED ITS AUTHORITY UNDER 11 U.S.C. SUBSECTION 365(b)(3) IN PERMITTING A DEBTOR TO ASSIGN AN EXECUTORY LEASE MAY OBTAIN APPELLATE REVIEW WITHOUT FIRST OBTAINING A STAY PURSUANT TO 11 U.S.C. SUBSECTION 363(m).

PARTIES TO THE PROCEEDING

The parties to the proceeding are only those noted in the caption.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED FOR REVIEW	i
PARTIES TO THE PROCEEDING	ii
OPINIONS AND ORDERS BELOW	1
STATEMENT OF JURISDICTION	1
RELEVANT STATUTORY AND RELATED PROVISIONS	1
STATEMENT OF THE CASE AND FACTS	2
ARGUMENT	3
A SHOPPING CENTER LANDLORD CLAIMING THAT A LOWER TRIBUNAL EXCEEDED ITS AUTHORITY UNDER 11 U.S.C. SUBSECTION 365(b)(3) IN PERMITTING A DEBTOR TO ASSIGN AN EXECUTORY LEASE MAY OBTAIN APPELLATE REVIEW WITHOUT FIRST OBTAINING A STAY PURSUANT TO 11 U.S.C. SUBSECTION 363(m)	3
CONCLUSION	7

TABLE OF AUTHORITIES

Page

CASES

In re Joshua Slocum, Ltd., 922 F.2d 1081 (3rd Cir. 1990) 4

STATUTES AND RULES

11 U.S.C. Section 363 ..... 1, 4, 7

11 U.S.C. Subsection 363(b)(1) 3

11 U.S.C. Subsection 363(m) 3, 4, 5, 7

11 U.S.C. Section 365 1

11 U.S.C. Subsection 365(b)(3) 2, 3, 4, 5, 6, 7

11 U.S.C. Subsection 365(f)(2)(A) 5

28 U.S.C. Section 1254 1

28 U.S.C. Section 1334 2

Fed. Rules of Civil Procedure, Rule 62(d) 1, 6

OPINIONS AND ORDERS BELOW

In re: *Rickel Home Centers, Inc., Petitioner. L.R.S.C. Co., Appellant v. Rickel Home Centers, Inc.; Staples, Inc.*, No. 98-7181 (3rd Cir. April 6, 2000)

Order In re: *Rickel Home Centers, Inc., Debtor,* No. 96-26 (U.S. Bankruptcy Court, D. Delaware, March 6, 1998)

Opinion In re: *Rickel Home Centers, Inc., Debtor,* No. 96-26 (U.S. Bankruptcy Court, D. Delaware, March 6, 1998)

Errata Order In re: *Rickel Home Centers, Inc., Debtor,* No. 96-26 (U.S. Bankruptcy Court, D. Delaware, March 12, 1998)

STATEMENT OF JURISDICTION

The judgment below was entered on April 6, 2000. Jurisdiction is conferred on this Court by 28 U.S.C. Section 1254.

RELEVANT STATUTORY AND RELATED PROVISIONS

11 U.S.C. Section 365

11 U.S.C. Section 363

These statutes are lengthy and are set out in full in the Appendix.

Fed. Rules of Civil Procedure, Rule 62(d)

STATEMENT OF THE CASE AND FACTS

On January 10, 1996, Rickel Home Centers, Inc. (Debtor), a home improvement center retailer with numerous stores, filed a voluntary petition for relief in the U. S. Bankruptcy Court for the District of Delaware. Petitioner, L.R.S.C. Co., was the landlord of one of Debtor's outlets, a 38,000 square foot space in a shopping center in Lawrenceville, New Jersey.[1] Debtor remained in possession of its properties and continued to operate its business.

On February 12, 1998, Debtor sought an order authorizing it to sell its interest in 41 lease agreements – including Debtor's lease with Petitioner – to Staples, Inc. (Staples) for $35,500,000.00 under an all or nothing proposal. Staples intended to itself occupy space of only 24,000 square feet in Petitioner's shopping center for use as an office supply center and desired to partition and sublease any excess space under the lease to others for undesignated purposes. Debtor's lease with Petitioner contained use restrictions, percentage rent requirements and other provisions commonly contained in shopping center leases. Accordingly, simultaneously with its request for authority to sell, Debtor requested relief from certain of these restrictions. Petitioner objected, but, after hearing, the Honorable Joseph J. Farnan, on March 6, 1998, entered an order and filed an opinion (App. 3, 20) granting Debtor's requested relief. Jurisdiction in the lower tribunal was conferred by 28 U.S.C. Section 1334.

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[1] It is not disputed in this proceeding that Petitioner owns a shopping center within the meaning of 11 U.S.C. Subsection 365(b)(3).

Petitioner timely filed its appeal to the U.S. Circuit Court of Appeals for the Third Circuit, claiming that the lower tribunal had exceeded its authority in allowing the assignment to Staples without use restrictions and without use limitations except as determined by the lower tribunal's future orders.

The Circuit Court heard argument on September 7, 1999, and, by judgment dated April 6, 2000 held (as relevant here) that Petitioner's substantive arguments were moot as Petitioner had not obtained a stay of proceedings pursuant to 11 U.S.C. subsection 363(m). This Petition is directed to the Circuit court's opinion.

ARGUMENT

A SHOPPING CENTER LANDLORD CLAIMING THAT A LOWER TRIBUNAL EXCEEDED ITS AUTHORITY UNDER 11 U.S.C. SUBSECTION 365(b)(3) IN PERMITTING A DEBTOR TO ASSIGN AN EXECUTORY LEASE MAY OBTAIN APPELLATE REVIEW WITHOUT FIRST OBTAINING A STAY PURSUANT TO 11 U.S.C. SUBSECTION 363(m).

The Third Circuit opinion ignored the clear language of 11 U.S.C. subsection 363(b)(1) that limits the application of this subsection to "property of the estate", and in doing so nullified the limitations clearly articulated in subsection 365(b)(3). This subsection, relating specifically to shopping centers, requires that the landlord receive "adequate assurance":

> "(A) of the source of rent and other consideration due under such lease, and in the case of an assignment, that the financial condition

> and operating performance of the proposed assignee and its guarantors, if any, shall be similar to the financial condition and operating performance of the debtor and its guarantors, if any, as of the time the debtor became the lessee under the lease;
>
> "(B) that any percentage rent due under such lease will not decline substantially;
>
> "(C) that assumption or assignment of such lease is subject to all the provisions thereof, including (but not limited to) provisions such as a radius, location, use, or exclusivity provision, and will not breach an such provision contained in any other lease, financing agreement, or master agreement relating to such shopping center; and
>
> "(D) that assumption or assignment of such lease will not disrupt any tenant mix or balance in such shopping center."

Subsection 363(m), indeed all of Section 363, does not contemplate that there is a contest as to what constitutes the "property of the estate". Petitioner's contention is that if subsection 365(b)(3) conditions are not met, the Debtor has no property interest in the lease to assign. The Third Circuit's opinion simply assumes that the property rights challenged by Petitioner are the "property of the estate" without regard to subsection 365(b)(3). While there appear to be no other circuit courts in conflict with the Third Circuit judgment, the judgment itself is in conflict with the Third Circuit's holding in *In re Joshua Slocum, Ltd.*, 922 F.2d 1081 (3rd Cir. 1990). There, the extent of the lower court's departure in modifying a shopping center lease was determined to be the threshold

issue, and subsection 363(m) was held to be no bar to a landlord's appeal.

In the present case, the lower court not only modified the use provision, but allowed the assignee to sublease to others a portion of the demised premises for indeterminate usage. In nullifying the specific conditions imposed by subsection 365(b)(3), the lower court relied upon subsection 365(f). Reliance on this subsection was misplaced because subsection 365(f)(2)(A) requires that the assignee assume the lease "in accordance with the provisions of this section", which necessarily includes the conditions enumerated in subsection 365(b)(3) with the sole exception of the anti-assignment requirement. Even so, the lower court recognized the conditional nature of the Debtor's property right in the challenged lease and, in treating this lease as a salable property, retained jurisdiction to determine whether a sub-tenancy was for a reasonable usage. The Bankruptcy Code makes no provision for indefinite retention of jurisdiction – possibly extending beyond the bankruptcy proceeding itself – to determine the reasonableness of a future subtenant and creates no standard of reasonableness or otherwise to apply in making a decision. Moreover, if Staples can sublease a portion of the premises free of review without a stay pursuant to subsection 363(m), there appears to be no legal concept that would impede their right to sublease the entire premises. And if an assignee has such authority, as is allowed by the Third Circuit, similarly there appears to be no legal concept to prevent assignees with no immediate occupancy requirements from purchasing leases solely for the purpose of speculation.

By not considering major departures from the articulated limitations of subsection 365(b)(3) without a stay of the proceedings, the Third Circuit's opinion required Petitioner to obtain a supersedeas bond for a potential $35,500,000.00 loss to Debtor.[2] The size of such a supersedeas bond bore no relationship to any actual loss of the single lease agreement in dispute, and effectively barred Petitioner from obtaining review of its claim. Petitioner has been unable to obtain information of the number of bankruptcies now involving bulk sales of shopping center lease agreements as such data is not published, but suggests that this has become a common occurrence in business bankruptcies. The Third Circuit's holding, for all practical purposes, prevents this class of shopping center landlords from appellate review by imposing an unreasonable supersedeas requirement, and makes the District Court the sole and only arbiter of what constitutes the "property of the estate".

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[2] *Fed. Rules of Civil Procedure Rule 62(d)*

(d) Stay Upon Appeal. When an appeal is taken the appellant by giving a supersedeas bond may obtain a stay subject to the exceptions contained in subdivision (a) of this rule. The bond may be given at or after the time of filing the notice of appeal or of procuring the order allowing the appeal, as the case may be. The stay is effective when the supersedeas bond is approved by the court.

CONCLUSION

The Court is urged to grant certiorari because the Third Circuit's judgment requires an unreasonable supersedeas bond, to cover a potential loss of a $35,500,000.00 transaction contemplating 41 leases, when Petitioner was seeking relief as to only one such lease. Additionally, the Third Circuit's judgment improperly extended 11 U.S.C. subsection 363(m) to cover issues where the property rights of the Debtor were themselves in dispute and, by doing so, nullified the requirements of 11 U.S.C. subsection 365(b)(3).

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 98-7181

IN RE: RICKEL HOME CENTERS, INC.,

Debtor

L.R.S.C., CO.,

Appellant

v.

RICKEL HOME CENTERS, INC.; STAPLES, INC.

On Appeal from the United States District Court
for the District of Delaware
(D.C. Civ. No. 96-cv-00026)
District Judge: Hon. Joseph J. Farnan, Jr.,

Argued September 7, 1999

Present: Sloviter and Roth, *Circuit Judges*, and Pogue, *United States Court of International Trade**

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the District of Delaware and was argued on September 7, 1999.

On consideration whereof, it is now here ordered and adjudged by this court that the appeal by L.R.S.C. of the

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* The Honorable Donald C. Pogue, Judge United States Court of International trade, sitting by designation.

District Court's order authorizing the Staples transaction and excising the use provision as moot pursuant to section 363(m) of the Bankruptcy Code is dismissed. The portion of L.R.S.C.'s appeal regarding the District Court's order retaining jurisdiction is dismissed as it is not ripe for review. Costs taxed against appellant. All of the above in accordance with the opinion of this Court.

ATTEST:

/s/ Marcie M. Waldron
Acting Clerk

Dated: April 6, 2000

Certified as a true copy and issued in lieu of a formal mandate on April 28, 2000.

Teste: /s/ Marcie M. Waldron

Acting Clerk, United States
Court of Appeals for the Third Circuit

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re:	)	Chapter 11
RICKEL HOME CENTERS, INC.,	)	Case No. 96-26 (JJF)
Debtor.	)	

ORDER PURSUANT TO SECTIONS 363, 365(a) AND 365(f) OF THE BANKRUPTCY CODE AND BANKRUPTCY RULES 6004 AND 6006 AUTHORIZING THE DEBTOR-IN-POSSESSION TO ASSUME (WHERE APPLICABLE) AND SELL AND ASSIGN NONRESIDENTIAL REAL PROPERTY LEASES

Upon the motion (the "Motion") of Rickel Home Centers, Inc., the above-captioned debtor and debtor-in-possession (the "Debtor"), dated February 12, 1998, for an order pursuant to Sections 363, 365(a) and 365(f) of title 11 of the United States Code (the "Bankruptcy Code") and Rules 6004 and 6006 of the Federal Rules of Bankruptcy Procedure (the "Bankruptcy Rules") authorizing the Debtor to (a) sell 41 nonresidential real property leases, as more particularly described on Exhibit A attached to this Order (the "Staples Leases"), pursuant to the terms and conditions of that certain Further Revised Offer to Purchase Leasehold Interests by Staples, Inc. ("Staples") or its nominee dated as of February 3, 1998, which was signed by the Debtor on February 4, 1998, a true copy of which is attached as Exhibit B to this Order and the Assumption and Assignment Agreement by and between the Debtor and Staples, a true copy of which is attached as Exhibit C to this Order (collectively, the

"Agreement"), and to (b) assume (where applicable) and assign to Staples or its nominee the Assigned Leases (as defined below);

And the Court having jurisdiction over this matter pursuant to 28 U.S.C. §§ 157 and 1334; and this being a core proceeding pursuant to 28 U.S.C. § 157(b)(2);

And it appearing that the relief requested is in the best interests of the Debtor's estate and its creditors;

And it appearing that good and sufficient notice of the Motion and the hearing thereon has been given to (a) the Office of the United States Trustee; (b) Wachtell, Lipton, Rosen & Katz, the attorneys for the Official Committee of Unsecured Creditors; (c) Otterbourg, Steindler, Houston & Rosen, P.C., the attorneys for Congress Financial Corporation, one of the Debtor's postpetition lenders; (d) Sullivan & Cromwell and Shearman & Sterling, the attorneys for West Windsor Holding corporation, one of the Debtor's postpetition lenders; (e) each of the landlords under the Assigned Leases (the "Landlords") and other parties-in-interest to the Staples Leases identified on Exhibit D attached to this Order; (f) counsel for Staples; (g) other bidders or their counsel, including Starwood-Ceruzzi LLC ("Starwood") and Rickel Realty LLC ("Rickel Realty"); and (h) all parties that have filed a notice of appearance in this chapter 11 case; and it appearing that no other notice need be given;

And the Court having held hearings on the Motions on February 26, March 3 and March 4, 1998, and having considered the objections thereto, and having overruled such objections as were not consensually resolved as to the assumption (where applicable) and assignment of the

Assigned Leases, except the objection of Plainbridge, Inc. and Pathmark Stores Inc. which the Court has sustained in a separate Memorandum Opinion and Order, including the objections of the landlord for the Debtor's Ramsey, NJ store;

NOW, THEREFORE, the Court hereby finds as follows:

A. The Debtor has determined, in the exercise of reasonable business judgment, that the Staples Leases should be sold to Staples or its nominee.

B. The Debtor has determined to enter into the Agreement.

C. The assumption (where applicable) and assignment of the Assigned Leases pursuant to section 365 of the Bankruptcy Code is in the best interests of the Debtor's estate and its creditors.

D. Staples' offer, made pursuant to sections 363 and 365 of the Bankruptcy Code and Bankruptcy Rules 6004 and 6006, and the terms and conditions of such offer, provides the best offer that the Debtor received for the Staples Leases, and such offer is fair and reasonable.

E. Pursuant to section 365(f) of the Bankruptcy Code, Staples has provided adequate assurance of future performance under the Assigned Leases.

F. Staples has designated Brick Norse Realty as its nominee for the Debtor's Bricktown, New Jersey store lease (the "Bricktown Lease"), which will be authorized by separate order of this Court and the assumption and

assignment and sale of the Bricktown Lease shall not be affected by this Order.

G. With respect to any Assigned Lease of property in a Shopping Center (as that term is used in section 365(b)(3) of the Bankruptcy Code), the assumption (if applicable) and the assignment of such leasehold to Staples for its intended use as an office superstore will not disrupt any tenant mix or balance in such Shopping Center and is otherwise in compliance with § 365(b)(3) of the Bankruptcy Code.

H. Except with respect to amounts as to which a Landlord has filed an objection reflecting a difference of views between the landlord and the Debtor (and as to which the Debtor has placed into escrow funds representing the difference, pending agreement or resolution by the Court), the Debtor's outstanding prepetition obligations under those of the Staples Leases that are Assigned Non-assumed (as defined below) are the amounts set forth on Exhibit E attached to this Order (the "Cure Amounts").

I. Each of the Assigned Leases is in full force and effect, with no events of default having occurred which will not be cured by Debtor's payment of the Cure Amounts or by the application of funds escrowed to effect such cure.

J. Staples negotiated the Agreement and purchased the Staples Leases in good faith, within the meaning of Bankruptcy Code section 363(m), and Staples is found to be a good faith purchaser under section 363(m).

K. The Debtor, as borrower, and Congress Financial Corporation ("Congress"), as lender,

are parties to that certain Loan and Security Agreement dated November 3, 1996, as amended by the Amendment and ratification Agreement dated January 10, 1997, as amended (the "Congress DIP Agreement"), which was approved by final order of this Court dated February 13, 1996 (the "Congress Final Order").

L. The Debtor, as borrower, and West Windsor Holding corporation ("West Windsor"), as lender, are parties to a Post-Petition Credit Agreement (the "West Windsor DIP Agreement"), dated as January 9, 1996, which was approved by final order of this Court dated February 13, 1996.

M. Each of Congress and West Windsor has a first priority lien and superpriority administrative claim in and to certain of the Debtor's leasehold interests.

N. The Agreement does not separately allocate the purchase price among any of the Staples Leases, with the exception of the lease for West Chester, PA (the "West Chester Lease"), for which $1,000,000 of the purchase price has been allocated.

O. Pursuant to a separate ruling by the Court, approved by separate order, the landlord with respect to the West Chester Lease exercised a right of first refusal and thereby purchased the West Chester Lease for $1,025,000 (the "Jaymate First Refusal Payment"), as a consequence of which the West Chester Lease was removed from the Agreement and the purchase price payable by Staples thereunder has been reduced by the Jaymate First Refusal Payment.

P. The purchase price under the Agreement exceeds the aggregate amount of all debt secured by liens upon the Staples leases.

Q. The proceeds of the sale of the Staples Leases will be used first to repay any amounts due each of West Windsor and Congress.

R. Two Leasing Associates, as agent for, and William K. Langfan, Robin Hammer, Mark Langfan and Dayna Langfan (collectively, the "Langfan Group") have filed an objection to the Motion relating to the premises located in Hamilton, New Jersey (the "Langfan Premises") described in and leased to the Debtor pursuant to that certain lease for the Langfan Premises dated January 26, 1979 (the "Langfan Lease"). The Langfan Group and Debtor have agreed to settle and resolve the Langfan Group's objection to the Motion; notwithstanding anything herein to the contrary, on the following basis:

(a) Debtor shall cause $350,000 to be placed into escrow (the "Escrow Fund"), with such Escrow Fund to be held by Morris, James, Hitchens & Williams in its interest bearing escrow account;

(b) If the building on the Langfan Premises that formerly was the Arthur Treachers Fast Food Restaurant (the "Building") is not rebuilt within four years of the closing on the transaction between the Debtor and Staples pursuant to which the Langfan Lease is to be assumed by the Debtor and assigned by it to Staples (the "Closing") then the escrow will be broken and the Escrow Fund, plus all accrued interest thereon, shall be paid to the Langfan Group;

(c) If the building is rebuilt within four years of the Closing then the escrow shall be broken and the Escrow Fund, plus all accrued interest thereon, shall be paid to Staples;

(d) For the Building to be considered as "rebuilt" within the contemplation of subparagraphs (b) and (c) above, a certificate of occupancy (the "CO's") of all local regulatory bodies with jurisdiction over the Langfan Premises must have been issued and in force, with the CO's providing that the Building meets or exceeds all applicable building codes and is ready for occupancy for its intended use; and

(e) Time shall be considered as of the essence with respect to the obligation to rebuild the Building within four years of the Closing.

S. Objectors and Limited or Conditional Objectors ("Objectors") Arlington Shopping Plaza, Inc.; Big M, Inc.; Bloomfield Plaza Associates, LP; Brick Norse Realty LLC; Davkee Corporation; Fusco Enterprises; Levin Management Corporation; Pal-Pike Associates; Prestige Bay Plaza Development Corp.; Ramco-Gershenson Properties, L.P.; Lester Robbins, Trustee; and two Leasing Associates, Inc. withdrew their objections to the Motion, following undertakings or agreements on the part of the Debtor and/or Staples.

ACCORDINGLY, after due deliberation, and sufficient cause appearing therefore, it is hereby

ORDERED that the Motion is hereby approved, subject to the terms and conditions of this Order; and it is further

ORDERED that the Agreement is incorporated herein by reference and its terms shall be binding upon the Debtor and each of the other parties thereto; and it is further

ORDERED that pursuant to sections 363 of the Bankruptcy Code, the Debtor is hereby authorized to sell the Staples Leases to Staples or its nominee pursuant to the Agreement; and it is further

ORDERED that pursuant to sections 363, 365(a) and 365(f) of the Bankruptcy Code, the Debtor is hereby authorized to assume, sell and assign to Staples or its nominee those of the Staples Leases described on Exhibit F attached to this Order (the "Assigned Non-assumed Leases"), pursuant to the terms and provisions of the Agreement; and it is further

ORDERED that pursuant to sections 363, 365(a) and 365(f) of the Bankruptcy Code, the Debtor is authorized to sell and assign to Staples or its nominee those of the Staples Leases described on Exhibit G attached to this Order (the "Assigned Assumed Leases," and together with the Assigned Non-assumed Leases, the "Assigned Leases"), pursuant to the terms and provisions of the Agreement; and it is further

ORDERED that nothing contained in this Order shall constitute or be deemed to be an assumption (where applicable) or authorization or approval of an assumption (where applicable) or assignment of those of the Staples

Leases referred to as "Deferred Leases" on Exhibits F and G attached to this Order (the "Deferred Leases"), or an expression of views as to the foregoing; and it is further

ORDERED that nothing contained in this Order shall prejudice the rights of any Landlord in connection with any subsequent motion by the Debtor to assume (where applicable) and/or assign a Deferred Lease, and the rights of all parties as to the Deferred Leases shall be preserved and reserved; and it is further

ORDERED that upon the entry of this Order and the closing of the Agreement, the Agreement shall be fully effective, and staples or its nominee(s) shall succeed to the entirety of the Debtor's rights and obligations in each of the leases assigned hereunder, first accruing from and after the date of closing, and shall have the rights of the tenant thereunder; and it is further

ORDERED that upon entry of this Order, Staples and its nominee(s) shall be entitled to the protections of Bankruptcy Code section 363(m); and it is further

ORDERED that pursuant to section 365(b)(1) of the Bankruptcy Code, the Debtor is authorized and directed to pay any Cure Amounts set forth on Exhibit E attached to this Order in connection with the assumption and assignment of the Assigned Non-assumed leases, which payment shall be in full satisfaction of any and all claims that may arise against the Debtor in connection with the Assigned Leases; and it is further

ORDERED that with respect to any Cure Amount as to which a Landlord filed an objection voicing a difference between the Landlord's belief as to the proper Cure

Amount and the Debtor's, and as to which the Court did not make a finding as the proper Cure Amount, the Debtor is authorized to cause funds equal in amount to such difference to be placed into escrow, pending resolution of the proper Cure Amount, as an alternate means of satisfying any and all claims that may arise against the Debtor in connection with the Staples Leases; PROVIDED that the claims deemed to be satisfied under this decretal paragraph shall only be those which are required to be satisfied under sections 365(f)(2)(A) and (b)(1)(A) of the Bankruptcy Code; and it is further

ORDERED that for the purposes of the preceding paragraph, Pal-Pike Associates, the landlord of the Debtor's Randolph, New Jersey store, shall be deemed to have filed an objection with respect to the Cure Amount and to be entitled to the protections described in the preceding paragraph; and it is further

ORDERED that the sale and assignment authorized hereunder shall be free and clear of all liens, claims, encumbrances on the Staples Leases, including without limitation, the liens of postpetition lenders Congress and West Windsor (the "Postpetition Lenders"), which shall attach to the proceeds received from Staples, to the extent now secured by leases, not to exceed the collective value of the leases that are each lienor's or the Postpetition Lender's collateral; and it is further

ORDERED that at the closing on the sale of the Staples Leases, the Debtor shall direct Staples to remit to West Windsor all amounts due to West Windsor, as of the date of the closing on the sale of the Staples Leases (the "Staples Closing Date"), pursuant to the terms of the

West Windsor DIP Agreement; PROVIDED that to the extent (and only the extent) that the Debtor disputes in good faith any amount said by West Windsor to be due under the West Windsor DIP Agreement, the Debtor shall be in compliance with the obligation in this decretal paragraph if it directs Staples to pay the disputed amount into a separate interest bearing escrow account, for the benefit of West Windsor and the Debtor, and as to which West Windsor shall have a first lien on the escrow balance (the disbursement of which escrow balance may be made upon written directions jointly executed by the Debtor, the Creditors' Committee and West Windsor, without further Court order, or failing such, the direction of the Court), and the existence of such escrow, and any payment into such escrow, shall be wholly without prejudice to the rights of any entity in connection with any dispute as to such disputed amount; and PROVIDED FURTHER that the right to escrow, in lieu of payment, amounts disputed in good faith shall not extend to unpaid principal or accrued interest at the regular (non-default) rate; and PROVIDED FURTHER that except to the extent any amounts disputed in good faith are paid into escrow in lieu of payment, all amounts claimed to be due to West Windsor shall be paid to West Windsor; and it is further

ORDERED that at the closing on the sale of the Staples Leases, the Debtor shall direct Staples to remit to Congress all amounts due Congress, as of the Staples Closing Date, pursuant to the terms of the Congress DIP Agreement and Congress Final Order; PROVIDED that to the extent (and only the extent) that the Debtor disputes in good faith the Early Termination Fee (as defined in the

Congress DIP Agreement), the Debtor shall be in compliance with the obligation in this decretal paragraph if it directs Staples to pay the disputed amount referred to below into a separate interest bearing escrow account, for the benefit of Congress and the Debtor, and as to which Congress shall have a first lien on the escrow balance (the disbursement of which escrow balance may be made upon written directions jointly executed by the Debtor, the Creditors' Committee and Congress, without further Court order, or, failing such, the direction of the Court), and the existence of such escrow, and any payment into such escrow, shall be wholly without prejudice to the rights of any entity in connection with any dispute as to such disputed amount; and PROVIDED FURTHER that the Debtor's right to escrow, in the absence of a further Court order, amounts disputed in good faith shall be limited to the Early Termination Fee, in an amount not to exceed $700,000; and PROVIDED FURTHER that except to the extent such disputed amount is paid into escrow in lieu of payment, all amounts claimed to be due to Congress shall be paid to Congress; and PROVIDED FURTHER that nothing herein shall restrict the Debtor from seeking authority from the Court (on expedited notice if necessary) to deposit into escrow additional amounts that it disputes in good faith; and it is further

ORDERED that if and to the extent that the Debtor has not already done so, the Debtor shall cause the proceeds of the Jaymate First Refusal Payment to be paid to Congress, as a credit against indebtedness of the Debtor to Congress; and it is further

ORDERED that if and to the extent that the Debtor has not already done so, the Debtor shall cause the

proceeds of the sale of the Bricktown Lease to be paid to West Windsor, as a credit against indebtedness of the Debtor to West Windsor; and it is further

ORDERED that the closing on the sale of the Staples Leases shall not be deemed to have occurred until each of West Windsor and Congress has received payment in full of all undisputed amounts due each of West Windsor and Congress, respectively, as of the Staples Closing Date, pursuant to the West Windsor DIP Agreement, the Congress DIP Agreement and the Congress Final Order, respectively and deposit of any amounts disputed in good faith has been made into escrow, as provided in the decretal paragraphs above; and it is further

ORDERED that any loans, advances or other financial accommodations extended to Debtor by Congress, in its sole discretion, prior to the closing of the sale of the Staples Leases, shall be secured by first priority liens and security interests in all of Debtor's assets, including, without limitation, the proceeds from the sale of the Staples Leases, in accordance with the terms, provisions and conditions set forth in the Congress DIP Agreement and the Congress Final Order; and it is further

ORDERED that the terms and conditions of the Congress DIP Agreement and the Congress Final order, and the liens, claims and security interests and superpriority administrative claim status previously granted in favor of Congress, shall continue to remain in full force and effect until all of the outstanding obligations, liabilities and indebtedness due Congress by Debtor has been fully paid and satisfied; and it is further

ORDERED that except as otherwise agreed between any Landlord and Staples, nothing in this Order shall be deemed to annul or vary any provision of any lease other than a provision that the Court has found prohibits, restricts or conditions the assignment of such lease to Staples or its nominee or is

(a) a provision providing in substance that the premises may be used only for a "Rickel" or "Channel" store;

(b) a provision providing in substance that the premises may be used only for a "Home Center" store or for the sale of goods typically sold therein;

(c) a provision unreasonably prohibiting necessary alterations to the premises or signage required to convert them to an alternative use;

(d) a provision commonly referred to as a "going dark" or "continuous operations" provision, providing in substance for a forfeiture of the lease or an increase in rent or other penalty by reason of the Debtor's cessation of retail operations before the assignment, and/or any delay by the assignee in reestablishing retail operations after the assignment, except that with respect to space not used for a Staples store, that delay may not exceed 18 months, unless the particular facts and circumstances of a given store warrant additional time which circumstances shall include without limitation the extent of restrictions and exclusives which limit potential tenants, the age and condition of the shopping center, the location of the premises in the shopping center, the shape of the premises to be assigned or sublet, the demographics of the shopping center's location and the overall

quality of the shopping center and its existing tenants;

(e) a provision conditioning assignment on landlord consent, or requiring payment to the landlord as the price of assignment;

(f) a provision effecting forfeiture or a modification of any of tenant's rights or obligations presently in effect under the Lease upon an assignment by the Debtor of the Lease; or

(g) a provision conditioning the Debtor's ability to assign its leasehold rights upon any terms not otherwise required under the Bankruptcy Code; and it is further

ORDERED that nothing in this Order shall be deemed to invalidate any otherwise valid guaranty of the tenant's obligations under the lease for the Union, New Jersey store; and it is further

ORDERED that Staples and/or its nominee, assigns or successors shall be bound by and honor the provisions of any valid sublease under the leases with respect to the Debtor's Ramsey and Union, New Jersey stores; and it is further

ORDERED that with respect to any of the Objectors Arlington Shopping Plaza, Inc. and Pal-Pike Associates which has not entered into a definitive agreement with Staples and, if applicable, the Debtor, resolving its objection on or before March 10, 1998, such Objector may file, on or before March 13, 1998, a motion for a determination by the Court as to the construction of any interim agreement reached between such Objector and Staples prior to the entry of this Order, instead of the remedy described in the preceding paragraph; and it is further

ORDERED that upon entry of this Order, this Order and the Findings hereunder shall be binding upon all parties to the Assigned Leases and the Agreement; and it is further

ORDERED that at the closing, immediately after Congress and West Windsor are paid upon the closing, the Debtor is authorized and directed to next cause to be paid Rickel Realty LLC $916,500, on account of, and in full satisfaction of, the "breakup fee" as defined in and authorized under the "Order Pursuant to Sections 105, 363 and 364 of the Bankruptcy Code (A) Approving, Subject to Higher and Better Offers and Necessary Section 365(b) Showings, Stalking Horse Floor Purchase Price Agreement (B) Approving Bidding Procedures for Solicitation of Higher Bids; and (C) Authorizing Payment of Breakup Fee," dated December 24, 1997;

ORDERED that this Court shall retain jurisdiction to construe and determine any disputes under this Order or under the Agreement; and it is further

ORDERED that the Debtor and Staples are hereby authorized and directed to execute and deliver any and all documents and to do all things necessary to effectuate the purposes of this Order, to transfer the Debtor's interests in and to the Staples Leases, in accordance with the terms of the Agreement, and to carry out the terms and conditions of such Agreement; and it is further

ORDERED that Staples as assignee and purchaser is not the successor in interest to the Debtor (other than with respect to the Debtor's rights and obligations under the Staples Leases first accruing after Staples takes an

assignment thereunder as provided for under the Agreement), or its bankruptcy estate by virtue of the transactions to be closed under the Agreement, or otherwise as a result of Staples taking title or possession of the Staples Leases and the subject premises and Staples is not assuming any liabilities or obligations of the Debtor or its bankruptcy estate, except as may be specifically provided for the Agreement; and it is further

ORDERED that notice of the Motion having been provided to (i) the Office of the United States Trustee; (ii) Wachtell, Lipton, Rosen & Katz, attorneys for the Official Committee of Unsecured Creditors; (iii) Otterbourg, Steindler, Houston & Rosen, P.C., attorneys for Congress, one of the Debtor's postpetition lenders; (iv) Sullivan & Cromwell and Shearman & Sterling, attorneys for West Windsor, one of the Debtor's postpetition lenders; (v) the Landlords and other parties-in-interest to the Staples Leases identified on Exhibit D attached to this Order; (vi) counsel for Staples; (vii) other bidders or their counsel, including Starwood and Rickel Reality; and (viii) all other parties who have filed a notice of appearance in this chapter 11 case, and any and all further notice of the relief granted in this Order is dispensed with and waived.

Dated: Wilmington Delaware
March 6, 1998

/s/ Joseph J. Farnan, Jr.
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

IN RE	:	Chapter 11
RICKEL HOME CENTERS, INC.,	:	Case No. 92-26-JJF
Debtor.	:	

Laura Davis Jones, Esquire and Brendan Linehan Shannon, Esquire of YOUNG, CONAWAY, STARGATT & TAYLOR, Wilmington, Delaware, Robert E. Gerber, Esquire and Matthew Barr, Esquire of FRIED, FRANK, HARRIS SHRIVER & JACOBSON, New York, New York. Attorneys for debtor and debtor-in-possession.

Norman Pernick, Esquire of SAUL, EWING, REMICK & SAUL, Wilmington, Delaware, Patrick P. DiNardo, Esquire and Deborah A. O'Malley, Esquire of SULLIVAN & WORCHESTER, LLP, Boston Massachusetts, Attorneys for Staples, Inc.

Douglas P. Bartner, Esquire and Frederic Sosnick, Esquire of SHEARMAN & STERLING, New York. Attorneys for Vornado, Inc.

Stephen M. Miller, Esquire of SMITH, KATZENSTEIN & FURLOW, LLP, Wilmington, Delaware. Richard J. Mason, P.C., and Brian L. Shaw, Esquire of ROSS & HARDIES, Chicago, Illinois. Attorneys for Net Realty Holding Trust.

William L. Witham, Jr., Esquire and Patricia Pyles McGonigle, Esquire of PRICKETT, JONES, ELLIOTT, KRISTOL & SCHNEE, Wilmington, Delaware. Barry W.

Frost, Esquire and Donna Markey DeGrezia, Esquire of TEICH, GROH AND FROST, Trenton, New Jersey. Attorneys for L.R.S.C. Co.

OPINION

March 6, 1998

Wilmington, Delaware

/s/ Joseph J. Farnam, Jr.
Farnam, Chief Judge.

Presently before the Court are three objections to the Motion For An Order Pursuant To Sections 363, 365(a) and 365(f) Of The Bankruptcy Code And Bankruptcy Rules 6004 And 6006 Authorizing The Debtor-In-Possession To Assume (Where Applicable) And Sell And Assign Nonresidential Real Property Leases filed by Rickel Home Centers, Inc. (the "Debtor") (D.I.1275). Objections have been raised by Vornado, Inc. ("Vornado")[1], Net Realty Holding Trust ("Net") (D.I.1299) and L.R.S.C., Co. ("LRSC") (D.I.1300). For the reasons set forth below, the Court will overrule the Objections.

FACTUAL BACKGROUND

I. The Debtor's Motion

In its Motion, the Debtor seeks an order authorizing it to sell 41 of its leases to Staples, Inc. ("Staples"), or its

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[1] For the record, the Court notes that Vornado's Objection does not appear on the docket sheet for this case, and therefore, the Court cannot cite to the appropriate Docket Item Number.

nominee, and to assume (where applicable) and assign the selected leases that Staples desires to have assigned to it, pursuant to an agreement between the Debtor and Staples. Under the terms of this agreement, Staples has agreed to pay the Debtor $35.5 million in exchange for the leases. To secure its performance under the Agreement, Staples has posted a $3 million deposit, which is currently being held in escrow.

In addition, the Agreement provides that Staples may assign its rights under the Agreement to any nominee. The Debtor and Staples have represented that they expect such nominee to be a Staples affiliate. In the event of an assignment by Staples to its nominee, Staples has agreed to unconditionally guarantee all of its obligations under the Agreement.

II. The Objections

Although numerous objections were initially raised to the Motion, Staples and the Debtor have negotiated settlement agreements with all but three of the objecting parties. The remaining objections have been filed by Vornado, Net and LRSC.

A. Vornado

Vornado is the owner of a shopping center known as the Bradlees Shopping Center, on Hackensack Avenue, Hackensack, NJ (the "Hackensack Shopping Center"). Pursuant to the terms of a lease (the "Hackensack Lease") dated November 1, 1982, between Vornado and Grace Retail Corporation, Vornado agreed to lease a 41,000

square foot store (the "Hackensack Store") in the Hackensack Shopping Center to Grace, the predecessor of Channel Home Centers, Inc., for the purposes of Operating a Channel Home Center. In 1994, Channel was acquired by Rickel Home Center, Inc., who continued to operate the Hackensack Store as a home improvement store until it completed its "going out of business" sales. Staples has represented that it intends to open a 24,000 square foot Staples Store in the former Rickel's store and sublet the remaining 17,000 square foot store to another entity.

Vornado objects to the Debtor's Motion on both constitutional and statutory grounds. With respect to the constitutional aspect of its objection, Vornado contends that the Debtor's Motion deprives Vornado of its due process rights because, to the extent that the Debtor is seeking to modify the Hackensack Lease in its Motion, the Motion fails to specify the provisions the Debtor seeks to modify.[2] With respect to the statutory grounds raised, Vornado raises three specific objections premised on Section 365(b)(3) of the Bankruptcy Code: (1) that the Debtor and Staples should not be permitted to disregard the use restrictions in the lease; (2) that Staples' need to paint and subdivide the Hackensack Store will violate provisions in the lease concerning alterations to the property; (3) that Staples' proposed use of the Hackensack

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[2] Based on the record of the hearing, it is the Court's understanding that the Debtor and Staples remedied any deficiency in their Motion by pointing out those provisions in the lease that they seek to modify. Because the Court understands that the parties have resolved this issue, the Court will not address it.

Store will disrupt the tenant mix in the Hackensack Shopping Center; and (4) that any modifications to the lease, including the excise of the provisions and restrictions discussed above and certain provisions pertaining to future assignments of the lease, should not be permanent.

At the hearing, Vornado took the position that the Court could appropriately waive all of the provisions and restrictions in the lease, with the exception of the alterations provision, on a "one-time" basis for the purposes of allowing the Debtor to assign the lease to Staples for the operation of an office supply store. However, because Staples will only be operating a Staples Store in 24,000 square feet of the space and intends to sublet the remaining portion of the store, Vornado directs its objections to that portion of the Hackensack Store which Staples intends to sublet.

B. Net

Net is the landlord under a lease (the "Bethlehem Lease") pertaining to the Debtor's store located in the Lehigh Shopping Center in Bethlehem, Pennsylvania (the "Lehigh Shopping Center"). Presently, the Lehigh Shopping Center has two vacant stores, a 48,000 square foot store formerly occupied by Rickel (the "Bethlehem Store") and a 60,000 square foot store formerly occupied by a department store. Staples has represented that it intends to operate a 24,000 square foot Staples Store in the store formerly occupied by Rickel and sublet the remaining 24,000 square foot store to another entity.

Although Net raises several objections to the Debtor's Motion, for purposes of discussion, these objections can be categorized into four grounds: (1) Staples should not be permitted to occupy only a portion of the space and sublet the remaining space; (2) the tenant mix of the shopping center will be affected by the assignment to Staples, because the store will "go dark" for a period of time; (3) the percentage rent at the shopping center will be affected; and (4) the Debtor and Staples have not provided sufficient evidence of what Staples intends to do with the Bethlehem Store (i.e. when Staples will commence operations, how much space Staples will occupy, leave dark or attempt to sub-let).[3]

C. LRSC

LRSC entered into a lease agreement (the "Lawrence Lease") with the Debtor, as successor in interest after a series of assignments from Channel dated March 22, 1976, pertaining to Store No. 15 (the "Lawrence Store") at the Lawrence Shopping Center, Lawrence Township, Mercer County, New Jersey (the "Lawrence Shopping Center").

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[3] At the hearing, Staples proffered that it intends to utilize 24,000 square feet of the Bethlehem Store as a Staples Store and sublet the balance of the Bethlehem Store to another entity. Net objected to the proffer as insufficient and moved to dismiss the Debtor's Motion. The Court denied the motion to dismiss, finding the proffer sufficient. Accordingly, the Court will overrule Net's objection that the Debtor and Staples did not provide sufficient evidence of Staples' intent regarding the Bethlehem Store.

Since 1976, the Lawrence Store has been a home improvement store. The original term of the lease was for fifteen years, with three five-year options. Two of these three five-year options were previously exercised by Channel on January 29, 1991 and then by the Debtor on January 29, 1996.

With respect to the Lawrence Lease, a dispute arose concerning the Debtor's exercise of an option to renew the lease prior to the Debtor's assumption or rejection of the lease. On December 10, 1996, LRSC filed a motion for an order pursuant to § 365 of the Bankruptcy Code requiring the Debtor to assume or reject the lease within a shortened period of time and for an order declaring the Debtor's exercise of the option void. Prior to a hearing on LRSC's motion, the Debtor and LRSC settled the matter.

The Lawrence Store is approximately 38,000 square feet. As with the previous stores discussed, Staples has represented to the Court that it intends to operate a Staples Store in 24,000 square feet and sublet the balance. LRSC has represented to the Court that its intent, if successful in its objection, is to divide up the 38,000 square foot store into a series of smaller stores that will cater to home improvement needs, such as carpeting, kitchen cabinetry, wallpaper and window treatments.

LRSC objects to the Debtor's Motion on the grounds that: (1) the Debtor and Staples should not be permitted to disregard the use provision in the lease; (2) the Debtor and Staples should not be permitted to disregard provisions requiring landlord consent for assignment, requiring payment to landlord as a price of assignment and affecting forfeiture or modification of any tenants' rights

or obligations under the lease; (3) the tenant mix at the Lawrence Shopping Center will be affected and (4) Staples and the Debtor have not provided sufficient evidence concerning the financial condition of Staples.

DISCUSSION

I. Use Restrictions

Both Vornado and LRSC object to the Debtor's Motion on the grounds that the proposed operation of a Staples Store in their respective shopping centers will violate use restriction provisions in their respective leases. Section 9.01 of the Hackensack Lease provides that the Hackensack Store shall only be used "for the purposes of a typical Channel Home Improvement Center and for no other purpose." Additionally Section 1.08(b) of the Hackensack Lease makes clear that the tenant's operation is to be a "Home Improvement Center." Similarly, Article 10 of the Lawrence Lease provides that the "[t]enant may use the Premises as a Channel Home Center similar in operation to a majority of the Channel Home Centers then in operation in New Jersey, and except as provided herein, for no other purpose." Both Vornado and LRSC contend that these restrictions are important to preserving the tenant mix in their shopping centers.

While Vornado agrees that the use restriction may be overlooked for the purposes of the Debtor's assignment to Staples, Vornado contends that it would be inappropriate to excise this provision from the lease, such that it would be inapplicable to any future assigns or sublets of the remaining 17,00 [sic] square feet of the subject space

that will not be used as a Staples Store. However, LRSC does not limit its objection solely to the space to be sublet. Rather, LRSC contends that the operation of a Staples Store in any portion of the premises should not be permitted. In addition to the grounds raised above, LRSC points out that this provision was important to the settlement arranged between the Debtor and LRSC concerning LRSC's previous motion, and that LRSC intends to maintain this use provision, if it is successful in its motion, by dividing the Lawrence Store and leasing it to entities involved in the home improvement business.

At the hearing, the Debtor proffered the testimony of Mr. Joseph Newsome, president and chief executive officer of the Debtor. If called, Mr. Newsome would testify that the typical Channel Home Improvement Center, which is referred to in the Hackensack and Lawrence Leases, has either become obsolete or is struggling to remain in existence, as a result of the advent of warehouse type home improvement stores like Home Depot. Mr. Newsome would further testify that none of the Debtors' stores would be suitable for a warehouse style store, and that no warehouse style home center stores indicated an interest in any of the Debtor's leases. Further, Mr. Newsome would testify that although some Sears Hardware Stores have recently opened in New Jersey, these stores are not a home center, because they do not sell product lines that constitute 57% of the typical home improvement center business.

Factually, neither Vornado nor LRSC have offered any evidence to rebut the Debtor's proffer in this regard. Indeed, LRSC's plans for the Lawrence Store support the Debtor's proffer in that LRSC must subdivide and rent to

a variety of entities to continue the home improvement use, because of the difficulty of finding a single viable entity engaged in the home improvement business.

Legally, in support of their positions concerning the use restrictions, Vornado and LRSC rely upon the language of Section 365(b)(3)(C), which provides that the assumption or assignment of leases is subject to all the provisions of the relevant leases. However, Section 356(b)(3) is not meant to be read in isolation. Rather, Section 365(b)(3) must be read in conjunction with the section that it cross-references, Section 365(f). In pertinent part, Section 365(f)(1) provides:

> [N]otwithstanding a provision in an executory contract or unexpired lease of the debtor, or in applicable law, that prohibits, restricts, or conditions, the assignment of such contract or lease, the trustee may assign such contract or lease under paragraph (2) of this subsection . . .

11 U.S.C. § 365(f)(1).

In interpreting Section 356(f), courts and commentators alike have construed the terms to not only render unenforceable lease provisions which prohibit assignment outright, but also lease provisions that are so restrictive that they constitute de facto anti-assignment provisions. *See e.g. In re Joshua Slocum Ltd.*, 922 F.2d 1081, 1090 (3d Cir. 1991) (recognizing that "[e]ven under the tightly drawn definition of "adequate assurance" in the shopping center context, Congress did not envision literal compliance with all lease provisions"); *In re Paul Harris*, 1992 Bankr. LEXIS 2418 (S.D. Ind. 1992); S. Rep. No. 98-65, 98th Cong. 1st Sess. 41 (1983); Collen, *Buying and Selling Real Estate in Bankruptcy*, (1997) ¶ 7.06[3]. Based upon the

Debtor's proffered testimony of Mr. Newsome, which the Court finds both credible and unrebutted, the Court concludes that the provisions of the Hackensack Lease and Lawrence Lease restricting the use of the respective stores to Channel Home Centers, or to home improvement centers, are de facto anti-assignment clauses. Given that the market for such centers is either non-existent or in dire straits, such use restrictions would make it impossible for the Debtor to assign the Lawrence Lease to any entity and impossible for the Debtor and/or for Staples to assign or sublet the 17,000 square feet not used for a Staples Store under the Hackensack Lease to any entity. Accordingly, the Court concludes that it is appropriate to permanently strike these restrictive use provisions from the Hackensack and Lawrence Leases.

II. Alterations Provisions

Both Vornado and Net raise concerns regarding alterations provisions in the Lease. While both parties oppose Staples' proposed subdivision of their respective stores, Vornado raises additional alterations concerns regarding Staples' need to paint the premises. In addition, Vornado has taken a different legal approach to the questions involved, and therefore, the Court will address Vornado and Net's alterations concerns separately.

A. Vornado

Vornado contends that Staples' need to paint and subdivide the Hackensack Store will violate the lease provisions concerning alterations. Vornado raises these

objection [sic] both to the use of the Hackensack Store as a Staples Store and to that portion of the Hackensack Store which is to be divided and sublet by Staples.

To the extent that Vornado contends that the Court cannot overlook this provision so as to allow a Staples Store to operate on the premises, the Court will deny the objection. At the hearing Vornado conceded that the Court could overlook use restrictions, as well as six-month to 12-month consent provisions for subletting, in order to allow a Staples Store to operate. Vornado further conceded that such use restrictions and consent provisions are more substantive than painting and space division restrictions. However, Vornado maintained that painting and division restrictions cannot be overlooked in order to allow a Staples to operate. It is the Court's view that such alterations provisions are essentially "nuisance" provisions, in the context of the present discussion which may be more easily overlooked by a court to allow a Debtor to assign property, than use or consent provisions, which Vornado concedes may be overlooked by the Court. Further, the Court finds credible and accepts the unrebutted proffer by Staples that Vornado is presently the landlord to eight Staples Stores in various locations. Based on this proffer, the Court finds Vornado's concerns about the alterations to the property to be disingenuous.

To the extent that Vornado contends that physically subdividing the Hackensack Store would destroy an anchor space in the Hackensack Shopping Center, the Court will likewise overrule Vornado's objection. Again, the Court finds credible and accepts the unrebutted proffer by Staples that its stores are often considered anchors

in shopping centers, and that such stores generate a significant amount of weekday, as well as weekend traffic to draw in customers, which both parties agree is the principle function of so-called anchor stores in shopping centers. Based on this testimony, the Court finds that although Staples intends to occupy 24,000 square feet of the assigned 41,000 square feet, Staples would still be an anchor for the shopping center and attract a sizeable customer base. Therefore, insofar as the instant alterations clauses could preclude the Debtor's assignment to Staples under the circumstances of this case, the Court finds the alterations clauses to be de facto anti-assignment clauses. Accordingly, the Court will overrule Vornado's objection to the modification of alterations provisions, as they pertain to the operation of a Staples Store on the premises.

As to Vornado's objection that the alterations clauses should not be permanently excised from the lease, so as to be non-binding on the entity that sublets the remaining space not utilized by Staples, the Court will sustain Vornado's objection. It is the Court's view that the retention of these provisions will provide the Hackensack Shopping Center owner with a reasonable measure of control over the entity to which Staples will sublet the property. In addition, the Court further finds that these provisions will not have an adverse affect on the subletting of the lease, rendering these provisions de facto anti-assignment provisions.[4]

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[4] For further discussion on the issue of the permanent excise of lease provisions see infra Part VI of this Opinion.

B. Net

Net objects to Staples proposal to physically subdivide the Bethlehem Store. In support of its objection, Net presented the testimony of Kevin O'Shea, Senior Director of Leasing of Net Realty. Mr. O'Shea testified that in his view, a larger store would be more likely to generate more customer traffic and that the Staples Store use would be too narrow to generate enough traffic in the Bethlehem Shopping Center. Mr. O'Shea further testified that he did not believe that a Staples Store would assist his efforts in leasing the vacant 60,000 square foot store in the Bethlehem Shopping Center.

In response, Staples again proffered the testimony that Staples Stores are often considered anchors in shopping centers, and that such stores generate a significant amount of weekday, as well as weekend traffic to draw in customers, which, both parties again agree is the principle function of so-called anchor stores in shopping centers. In addition, Staples proffered that Net maintains a lease with a Staples Store occupying only 17,000 square feet in a New York shopping center and that although the New York store is smaller than the proposed Staples Store for the Bethlehem Store, the New York store is considered an anchor.

In reviewing the record, the Court credits and accepts Staples proffer. Clearly, Staples, who is in the business of operating Staples Stores, has a stronger basis from which to testify about the traffic that a Staples Store generates than Mr. O'Shea, whose experiences with Staples have been limited to the leasing of one Staples Store and to his experience as a customer of Staples Stores. The Court also

notes that Net offered no evidence to support Mr. O'Shea's view that a Staples Store would not generate enough customer traffic. In contrast, Staples has proffered estimates of its most recent sales figures, which impressively indicate that Staples generates a strong and profitable business.

In addition, the Court finds that in the context of the assignment between the Debtor and Staples, any prohibitions on subdividing in the Bethlehem Lease would constitute de facto anti-assignment provisions. Staples has based its bid for the Debtor's leases, including the Bethlehem Lease, on its ability to subdivide and sublet those portions of the stores not utilized by Staples to operate Staples Stores. In addition, Staples has proffered that in its experience in the office supply industry, a 24,000 square foot store is the most suitable size store in which to conduct its business. Therefore, to prohibit Staples from subdividing the store in this context would in effect preclude the Debtor from being able to assign the instant lease to Staples.

To the extent that Net relies on *In re Joshua Slocum, LTD.*, 922 F.2d 1081 (3d Cir. 1990) for the proposition that the Court cannot overlook the alterations provisions in the Bethlehem Lease, the Court finds *Joshua Slocum* to be distinguishable from the instant case. While recognizing that literal compliance with all lease provisions is not required in the context of Section 365 assignments, the Court of Appeals for the Third Circuit held that the bankruptcy court could not excise a provision in the debtor's lease authorizing either party to terminate the lease if the debtor's gross sales for the first six lease years did not average $711,245 per year. *Id.* at 1090-1092. As the

court recognized in its discussion, this clause was closely tied into the percent rent clause of the lease, and was necessary to enable the Landlord to accurately calculate the minimum total rent that he could be expected to receive.

In the Court's view, however, rent clauses, such as the one at issue in *Joshua Slocum*, are clearly more material and substantial to a lease than the alterations clauses at issue in this case, which the Court has already described as akin to "nuisance provisions." As such, the Court does not read *Joshua Slocum* to preclude the Court from overlooking the alterations clauses in the Bethlehem Lease for the purposes of allowing the assignment between the Debtor and Staples. Accordingly, the Court will overrule Net's objection to Staples' proposed subdivision.

III. Tenant Mix

Based on the record adduced at the hearing, as well as the papers submitted, it appears to the Court that Vornado and LRSC's tenant mix concerns are related to their concerns over the use restrictions in their respective leases. In contrast, Net raises the tenant mix issue in connection with its concerns that the Bethlehem property may be "dark" for some time. Therefore, the Court will address Net's tenant mix objection separately from the tenant mix objections of Vornado and LRSC.

A. Vornado and LRSC

Both Vornado and LRSC argue that the use restrictions help preserve the tenant mix in the Hackensack Shopping Center. However, as the Court overruled the objection based on the use restrictions, the Court must likewise overrule the tenant mix objection, to the extent that it overlaps with the use restriction objection.[5]

B. Net

Net contends that the tenant mix in its shopping center will be disrupted by the Debtor's assignment of the Bethlehem Lease to Staples, because the Debtor and Staples have not provided any evidence concerning how long the Bethlehem Store will be dark. After reviewing the submissions and the record on this issue, the Court will overrule Net's objection.

First, the Court notes that the Bethlehem Lease does not contain any provisions prohibiting "going dark." To this extent, Net cannot argue that the assignment from

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[5] For clarification regarding Vornado's position, the Court notes that Vornado does not contend that the operation of a Staples Store in the Hackensack Shopping Center will upset the tenant mix. Furthermore, it appears to the Court that Vornado did not raise tenant mix with regard to the portion of the property to be sublet. In any event, however, based on the representations of Staples, it appears to the Court that this is not an issue. Staples has represented to the Court that it intends to seek tenants that will complement the existing tenant mix, and that it seeks the landlord's acceptance of any proposed sublet tenant.

the Debtor to Staples will interfere with any provision of the Bethlehem Lease.

Second, at the present time, the Bethlehem Store is vacant because of the Debtor's liquidation. At the hearing, Staples proffered that it would take approximately six months for a Staples Store to become operational in a given site. Given the present condition of the Bethlehem Store, the Court does not find this period of time to be unreasonable, such that it would adversely affect the present tenant mix of the Bethlehem Shopping Center. In addition, with respect to the portion of the store not used by Staples, Staples proffered that it is in their best interest, as well as the shopping center's interest, to sublet the premises as quickly as possible. Based on Staples' proffers, which the Court credits, the Court has no reason to believe that Staples would allow the portion of the Bethlehem Store not used by Staples to remain dark for an unreasonable period of time.[6]

IV. Percentage Rent

Net objects to the Debtor's assignment of the Bethlehem Lease to Staples on the grounds that the assignment will cause a substantial decline in percentage rent. Net contends that, because a Staples Store will not generate a strong customer base, the sales in the shopping center will drop, and therefore, the percentage rents

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[6] Of course, if Staples efforts to sublet the property become unreasonable, the Landlord can seek the appropriate redress at that time.

owed to Net under the lease and by other tenants in the shopping center will decrease.

Section 365(b)(3)(B) provides that "adequate assurance of future performance of a lease of real property in a shopping center includes adequate assurance – (B) that any percentage rent *due under such lease* will not decline substantially." 11 U.S.C. § 365(b)(3)(B) (emphasis added). It is clear based upon the language of this Section, that the percentage rent referred to is rent due under the lease to be assigned. Therefore, to the extent that Net premises its argument upon the percentage rents owed by other tenants in the shopping center, the Court must overrule Net's objection.

To the extent that Net is concerned about the percentage rent due under the Bethlehem Lease, Staples proffered that the Debtor has not been paying any percentage rent, because the Debtor has liquidated. The Court finds Staples proffer credible and notes that Net has not offered any evidence to rebut the proffer. As there has been no percentage rent paid under the lease, there can be no decline in percentage rent as a result of the assignment of the Bethlehem Lease to Staples. Accordingly, the Court will overrule Net's percentage rent objection.

V. Financial Condition of Staples

LRSC objects to the assignment of the Lawrence Lease from the Debtor to Staples on the ground that neither the Debtor nor Staples have provided sufficient information regarding the financial condition of Staples. The basis for LRSC's objection is its concern that Staples

will not be able to meet its financial obligations due under the Lawrence Lease.

At the hearing, Staples proffered evidence that it operates 752 stores across the United States and approximately 30,000 stores world-wide. Staples further proffered that its most recently available sales figures indicate that Staples sales reached over $5 billion and that Staples net gross was over $170 million after taxes.

Under the Lawrence Lease, rent payments are approximately $2.22 per square foot, an amount well below the market value for the area, which is at least $10 per square foot. Given the proffer regarding Staples' financial condition, which the Court accepts and finds credible, and the low rent payments due under the Lawrence Lease, the Court finds that Staples has sufficient financial ability to satisfy its obligations under the Lawrence Lease.

VI. Modifications to the Lease

Both LRSC and Vornado object to the Debtor's Motion to the extent that it asks the Court to permanently strike certain provisions from their leases. LRSC and Vornado maintain that under Section 365(b)(3)(C), Staples is required to take the lease "subject to all provisions thereof, including (but not limited to) provisions such as radius, location, use, or exclusivity provision and will not breach any such provision contained in any other lease, financing agreement or master agreement relating to such shopping centers."

A. Use Restriction Clauses

To the extent Vornado and LRSC raise this argument with respect to their use restriction provisions, the Court has already found these provisions to be so unreasonable as to constitute de facto anti-assignment provisions. Accordingly, the Court finds it appropriate to permanently strike these provisions from the Hackensack and Bethlehem Leases, and therefore, Vornado and LRSC's objection, in this regard, is overruled.

B. Assignment and Subletting Clauses

In arguing that Staples is required to take the leases subject to all their provisions, Vornado and LRSC particularly emphasize the assignment and subletting clauses in their respective leases. Because of slight differences in their positions, the Court will address Vornado and LRSC's concerns regarding the assignment and subletting clauses separately.

1. Vornado

The Court understands that Vornado does not object to overlooking the assignment and subletting provisions for the purposes of allowing Staples into the Hackensack Store. As such, the Court understands Vornado to object to the permanent excise of these provisions, such that they will be inapplicable to Staples efforts to sublet that portion of the Hackensack Store not used for a Staples Store.

The Debtor's Motion, however, does not seek to permanently excise reasonable provisions from the Hackensack Lease, but only unreasonable provisions that would have the effect of blocking or prohibiting a sublet by Staples. In reviewing the Hackensack Lease, the Court does not find any of its assignment and subletting provisions to be facially unreasonable, and therefore the Court will not permanently excise any of these provisions from the Hackensack Lease. As Vornado concedes, the provisions will be set aside to allow Staples to take the assignment of the property, however, those provisions will remain in effect so that Staples will be subjected to them for purposes of their subletting efforts.

2. LRSC

Unlike Vornado, LRSC has not conceded that the Court may set aside assignment and subletting provision to allow the Debtor to assign the property to Staples. To the extent that LRSC objects to the setting aside of the assignment provision in the Lawrence Lease for purposes of allowing the assignment from the Debtor to Staples, the Court overrules LRSC's objection.

Article 15A of the Lawrence Lease provides that the "[t]enant shall have the right, without Landlords consent and without any requirements to notify Landlord as provided in B below to (A) assign its interest as tenant under this Lease or sublet any portion of the Demised Premises at any time or times to (i) a successor person, firm, or corporation resulting from consolidation, merger or from transfer of substantially all of Tenant's assets, (herein referred to as 'Successor') . . . " In this case, the Debtor

has proffered that the transaction with Staples has involved the transfer of 96% of the Debtor's assets. The Court has no reason to doubt the credibility of this proffer and finds 96% of the Debtor's assets to be substantially all of its assets. Accordingly, under the very provisions of the Lawrence Lease, the Court concludes that the assignment from the Debtor to Staples is permissible.

To the extent that LRSC is concerned about the permanent excise of these provisions from the Lawrence Lease, the Court reiterates that the Debtor's Motion is not seeking to permanently excise reasonable provisions from the Lawrence Lease, but only unreasonable provisions that would have the effect of blocking or prohibiting a sublet by Staples. The Court has reviewed the Lawrence Lease and finds that the assignment and subletting provisions are not facially unreasonable. Therefore, once Staples assumes the Lawrence Lease, Staples will be required to abide by these provisions.

C. Other Lease Provisions

To the extent that Vornado, Net and LRSC object to the permanent excise of any provisions of their respective leases, the Court will overrule the objection.

As stated above in discussing the assignment and sublet clauses, the Debtor's Motion only seeks to excise unreasonable provisions in the leases that will prohibit a sublet by Staples. The Court has reviewed the Hackensack Lease, the Bethlehem Lease and the Lawrence Lease.

With the exception of the use restriction clauses contained in the Hackensack Lease and Lawrence Lease discussed above, the Court finds that all of the provisions in each of the three leases are facially reasonable. As such, once the leases have been assigned to Staples by the Debtor, Staples will be subjected to all the provisions of the leases for purposes of their subletting efforts.

While the Court will not strike any provisions in the leases at this time, the Court will retain jurisdiction over this matter under the terms of the Order presented with the Debtor's Motion. Therefore, should any landlord attempt to enforce a lease provision in an unreasonable manner, Staples is free to return to this Court for the appropriate relief. Likewise, if Staples attempts to unreasonably disregard any reasonable provision in its efforts to sublet the property, such that the landlord believes Staples is violating § 365 of the Bankruptcy Code, the landlord may also return to this Court for the appropriate relief.

CONCLUSION

For the reasons discussed, the Court will overrule the Objections filed by Vornado, Net and LRSC.

An appropriate Order will be entered.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

IN RE	:	Chapter 11
RICKEL HOME CENTERS, INC.,	:	Case No. 96-26-JJF
Debtor.	:	

ERRATA ORDER

WHEREAS, the Court issued an Opinion in the above-captioned matter on March 6, 1998 which requires correction;

NOW THEREFORE, IT IS HEREBY ORDERED this 12 day of March 1998, that:

1) On page 9 and page 10, the name "Mr. Joseph Newsome" is corrected to read "Mr. Joseph Nusim";

2) On page 9 of the Opinion, the reference to "Section 356(b)(3)" and "Section 356(f) is corrected to read "Section 365(b)(3)" and "Section 365(f)";

3) On Page 19 of the Opinion the sentence, "At the hearing, Staples proffered evidence that it operates 752 stores across the United States and approximately 30,000 stores world-wide," is corrected to read, "At the hearing, Staples proffered evidence that it operates 752 stores world-wide and has approximately 30,000 employees world-wide."

/s/ Joseph J. Farnan, Jr.
UNITED STATES
DISTRICT JUDGE

11 U.S.C. § 363. Use, sale, or lease of property

(a) In this section, "cash collateral" means cash, negotiable instruments, documents of title, securities, deposit accounts, or other cash equivalents whenever acquired in which the estate and an entity other than the estate have an interest and includes the proceeds, products, offspring, rents, or profits of property and the fees, charges, accounts or other payments for the use or occupancy of rooms and other public facilities in hotels, motels, or other lodging properties subject to a security interest as provided in section 552(b) of this title, whether existing before or after the commencement of a case under this title.

(b)(1) The trustee, after notice and a hearing, may use, sell, or lease, other than in the ordinary course of business, property of the estate.

(2) If notification is required under subsection (a) of section 7A of the Clayton Act in the case of a transaction under this subsection, then –

> (A) notwithstanding subsection (a) of such section, the notification required by such subsection to be given by the debtor shall be given by the trustee; and
>
> (B) notwithstanding subsection (b) of such section, the required waiting period shall end on the 15th day after the date of the receipt, by the Federal Trade Commission and the Assistant Attorney General in charge of the Antitrust Division of the Department of Justice, of the notification required under such subsection (a), unless such waiting period is extended –

(i) pursuant to subsection (e)(2) of such section, in the same manner as such subsection (e)(2) applies to a cash tender offer;

(ii) pursuant to subsection (g)(2) of such section; or

(iii) by the court after notice and a hearing.

(c)(1) If the business of the debtor is authorized to be operated under section 721, 1108, 1203, 1204, or 1304 of this title and unless the court orders otherwise, the trustee may enter into transactions, including the sale or lease of property of the estate, in the ordinary course of business, without notice or a hearing, and may use property of the estate in the ordinary course of business without notice or a hearing.

(2) The trustee may not use, sell, or lease cash collateral under paragraph (1) of this subsection unless –

(A) each entity that has an interest in such cash collateral consents; or

(B) the court, after notice and a hearing, authorizes such use, sale, or lease in accordance with the provisions of this section.

(3) Any hearing under paragraph (2)(B) of this subsection may be a preliminary hearing or may be consolidated with a hearing under subsection (e) of this section, but shall be scheduled in accordance with the needs of the debtor. If the hearing under paragraph (2)(B) of this subsection is a preliminary hearing, the court may authorize such use, sale, or lease only if there is a reasonable likelihood that the trustee will prevail at the final hearing

under subsection (e) of this section. The court shall act promptly on any request for authorization under paragraph (2)(B) of this subsection.

(4) Except as provided in paragraph (2) of this subsection, the trustee shall segregate and account for any cash collateral in the trustee's possession, custody, or control.

(d) The trustee may use, sell, or lease property under subsection (b) or (c) of this section only to the extent not inconsistent with any relief granted under section 362(c), 362(d), 362(e), or 362(f) of this title.

(e) Notwithstanding any other provision of this section, at any time, on request of an entity that has an interest in property used, sold, or leased, or proposed to be used, sold, or leased, by the trustee, the court, with or without a hearing, shall prohibit or condition such use, sale, or lease as is necessary to provide adequate protection of such interest. This subsection also applies to property that is subject to any unexpired lease of personal property (to the exclusion of such property being subject to an order to grant relief from the stay under section 362).

(f) The trustee may sell property under subsection (b) or (c) of this section free and clear of any interest in such property of an entity other than the estate, only if –

(1) applicable nonbankruptcy law permits sale of such property free and clear of such interest;

(2) such entity consents;

(3) such interest is a lien and the price at which such property is to be sold is greater than the aggregate value of all liens on such property;

(4) such interest is in bona fide dispute; or

(5) such entity could be compelled, in a legal or equitable proceeding, to accept a money satisfaction of such interest.

(g) Notwithstanding subsection (f) of this section, the trustee may sell property under subsection (b) or (c) of this section free and clear of any vested or contingent right in the nature of dower or curtesy.

(h) Notwithstanding subsection (f) of this section, the trustee may sell both the estate's interest, under subsection (b) or (c) of this section, and the interest of any co-owner in property in which the debtor had, at the time of the commencement of the case, an undivided interest as a tenant in common, joint tenant, or tenant by the entirety, only if –

(1) partition in kind of such property among the estate and such co-owners is impracticable;

(2) sale of the estate's undivided interest in such property would realize significantly less for the estate than sale of such property free of the interests of such co-owners;

(3) the benefit to the estate of a sale of such property free of the interests of co-owners outweighs the detriment, if any, to such co-owners; and

(4) such property is not used in the production, transmission, or distribution, for sale,

of electric energy or of natural or synthetic gas for heat, light, or power.

(i) Before the consummation of a sale of property to which subsection (g) or (h) of this section applies, or of property of the estate that was community property of the debtor and the debtor's spouse immediately before the commencement of the case, the debtor's spouse, or a co-owner of such property, as the case may be, may purchase such property at the price at which such sale is to be consummated.

(j) After a sale of property to which subsection (g) or (h) of this section applies, the trustee shall distribute to the debtor's spouse or the co-owners of such property, as the case may be, and to the estate, the proceeds of such sale, less the costs and expenses, not including any compensation of the trustee, of such sale, according to the interests of such spouse or co-owners, and of the estate.

(k) At a sale under subsection (b) of this section of property that is subject to a lien that secures an allowed claim, unless the court for cause orders otherwise the holder of such claim may bid at such sale, and, if the holder of such claim purchases such property, such holder may offset such claim against the purchase price of such property.

(*l*) Subject to the provisions of section 365, trustee may use, sell, or lease property under subsection (b) or (c) of this section, or a plan under chapter 11, 12, or 13 of this title may provide for the use, sale, or lease of property, notwithstanding any provision in a contract, a lease, or applicable law that is conditioned on the insolvency or financial condition of the debtor, on the commencement

of a case under this title concerning the debtor, or on the appointment of or the taking possession by a trustee in a case under this title or a custodian, and that effects, or gives an option to effect, a forfeiture, modification, or termination of the debtor's interest in such property.

(m) The reversal or modification on appeal of an authorization under subsection (b) or (c) of this section of a sale or lease of property does not affect the validity of a sale or lease under such authorization to an entity that purchased or leased such property in good faith, whether or not such entity knew of the pendency of the appeal, unless such authorization and such sale or lease were stayed pending appeal.

(n) The trustee may avoid a sale under this section if the sale price was controlled by an agreement among potential bidders at such sale, or may recover from a party to such agreement any amount by which the value of the property sold exceeds the price at which such sale was consummated, and may recover any costs, attorneys' fees, or expenses incurred in avoiding such sale or recovering such amount. In addition to any recovery under the preceding sentence, the court may grant judgment for punitive damages in favor of the estate and against any such party that entered into such an agreement in willful disregard of this subsection.

(o) In any hearing under this section –

(1) the trustee has the burden of proof on the issue of adequate protection; and

(2) the entity asserting an interest in property has the burden of proof on the issue of the validity, priority, or extent of such interest.

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11 U.S.C. § 365. Executory contracts and unexpired leases

(a) Except as provided in sections 765 and 766 of this title and in subsections (b), (c), and (d) of this section, the trustee, subject to the court's approval, may assume or reject any executory contract or unexpired lease of the debtor.

(b)(1) If there has been a default in an executory contract or unexpired lease of the debtor, the trustee may not assume such contract or lease unless, at the time of assumption of such contract or lease, the trustee –

(A) cures, or provides adequate assurance that the trustee will promptly cure, such default;

(B) compensates, or provides adequate assurance that the trustee will promptly compensate, a party other than the debtor to such contract or lease, for any actual pecuniary loss to such party resulting from such default; and

(C) provides adequate assurance of future performance under such contract or lease.

(2) Paragraph (1) of this subsection does not apply to a default that is a breach of a provision relating to –

(A) the insolvency or financial condition of the debtor at any time before the closing of the case;

(B) the commencement of a case under this title;

(C) the appointment of or taking possession by a trustee in a case under this title or a custodian before such commencement; or

(D) the satisfaction of any penalty rate or provision relating to a default arising from any failure by the debtor to perform nonmonetary obligations under the executory contract or unexpired lease.

(3) For the purposes of paragraph (1) of this subsection and paragraph (2)(B) of subsection (f), adequate assurance of future performance of a lease of real property in a shopping center includes adequate assurance –

(A) of the source of rent and other consideration due under such lease, and in the case of an assignment, that the financial condition and operating performance of the proposed assignee and its guarantors, if any, shall be similar to the financial condition and operating performance of the debtor and its guarantors, if any, as of the time the debtor became the lessee under the lease;

(B) that any percentage rent due under such lease will not decline substantially;

(C) that assumption or assignment of such lease is subject to all the provisions thereof, including (but not limited to) provisions such as a radius, location, use, or exclusivity provision, and will not breach any such provision contained in any other lease, financing agreement, or master agreement relating to such shopping center; and

(D) that assumption or assignment of such lease will not disrupt any tenant mix or balance in such shopping center.

(4) Notwithstanding any other provision of this section, if there has been a default in an unexpired lease of the debtor, other than a default of a kind specified in

paragraph (2) of this subsection, the trustee may not require a lessor to provide services or supplies incidental to such lease before assumption of such lease unless the lessor is compensated under the terms of such lease for any services and supplies provided under such lease before assumption of such lease.

(c) The trustee may not assume or assign any executory contract or unexpired lease of the debtor, whether or not such contract or lease prohibits or restricts assignment of rights or delegation of duties, if –

(1)(A) applicable law excuses a party, other than the debtor, to such contract or lease from accepting performance from or rendering performance to an entity other than the debtor or the debtor in possession, whether or not such contract or lease prohibits or restricts assignment of rights or delegation of duties; and

(B) such party does not consent to such assumption or assignment; or

(2) such contract is a contract to make a loan, or extend other debt financing or financial accommodations, to or for the benefit of the debtor, or to issue a security of the debtor;

(3) such lease is of nonresidential real property and has been terminated under applicable nonbankruptcy law prior to the order for relief; or

(4) such lease is of nonresidential real property under which the debtor is the lessee of an aircraft terminal or aircraft gate at an airport at which the debtor is the lessee under one or more additional nonresidential leases of an aircraft terminal or aircraft gate and the trustee, in

connection with such assumption or assignment, does not assume all such leases or does not assume and assign all of such leases to the same person, except that the trustee may assume or assign less than all of such leases with the airport operator's written consent.

(d)(1) In a case under chapter 7 of this title, if the trustee does not assume or reject an executory contract or unexpired lease of residential real property or of personal property of the debtor within 60 days after the order for relief, or within such additional time as the court, for cause, within such 60-day period, fixes, then such contract or lease is deemed rejected.

(2) In a case under chapter 9, 11, 12, or 13 of this title, the trustee may assume or reject an executory contract or unexpired lease of residential real property or of personal property of the debtor at any time before the confirmation of a plan but the court, on the request of any party to such contract or lease, may order the trustee to determine within a specified period of time whether to assume or reject such contract or lease.

(3) The trustee shall timely perform all the obligations of the debtor, except those specified in section 365(b)(2), arising from and after the order for relief under any unexpired lease of nonresidential real property, until such lease is assumed or rejected, notwithstanding section 503(b)(1) of this title. The court may extend, for cause, the time for performance of any such obligation that arises within 60 days after the date of the order for relief, but the time for performance shall not be extended beyond such 60-day period. This subsection shall not be

deemed to affect the trustee's obligations under the provisions of subsection (b) or (f) of this section. Acceptance of any such performance does not constitute waiver or relinquishment of the lessor's rights under such lease or under this title.

(4) Notwithstanding paragraphs (1) and (2), in a case under any chapter of this title, if the trustee does not assume or reject an unexpired lease of nonresidential real property under which the debtor is the lessee within 60 days after the date of the order for relief, or within such additional time as the court, for cause, within such 60-day period, fixes, then such lease is deemed rejected, and the trustee shall immediately surrender such nonresidential real property to the lessor.

(5) Notwithstanding paragraphs (1) and (4) of this subsection, in a case under any chapter of this title, if the trustee does not assume or reject an unexpired lease of nonresidential real property under which the debtor is an affected air carrier that is the lessee of an aircraft terminal or aircraft gate before the occurrence of a termination event, then (unless the court orders the trustee to assume such unexpired leases within 5 days after the termination event), at the option of the airport operator, such lease is deemed rejected 5 days after the occurrence of a termination event and the trustee shall immediately surrender possession of the premises to the airport operator; except that the lease shall not be deemed to be rejected unless the airport operator first waives the right to damages related to the rejection. In the event that the lease is deemed to be rejected under this paragraph, the airport operator shall provide the affected air carrier adequate opportunity after the surrender of the premises to remove

the fixtures and equipment installed by the affected air carrier.

(6) For the purpose of paragraph (5) of this subsection and paragraph (f)(1) of this section, the occurrence of a termination event means, with respect to a debtor which is an affected air carrier that is the lessee of an aircraft terminal or aircraft gate –

(A) the entry under section 301 or 302 of this title of an order for relief under chapter 7 of this title;

(B) the conversion of a case under any chapter of this title to a case under chapter 7 of this title; or

(C) the granting of relief from the stay provided under section 362(a) of this title with respect to aircraft, aircraft engines, propellers, appliances, or spare parts, as defined in section 40102(a) of title 49, except for property of the debtor found by the court not to be necessary to an effective reorganization.

(7) Any order entered by the court pursuant to paragraph (4) extending the period within which the trustee of an affected air carrier must assume or reject an unexpired lease of nonresidential real property shall be without prejudice to –

(A) the right of the trustee to seek further extensions within such additional time period granted by the court pursuant to paragraph (4); and

(B) the right of any lessor or any other party in interest to request, at any time, a shortening or termination of the period within which

the trustee must assume or reject an unexpired lease of nonresidential real property.

(8) The burden of proof for establishing cause for an extension by an affected air carrier under paragraph (4) or the maintenance of a previously granted extension under paragraph (7)(A) and (B) shall at all times remain with the trustee.

(9) For purposes of determining cause under paragraph (7) with respect to an unexpired lease of nonresidential real property between the debtor that is an affected air carrier and an airport operator under which such debtor is the lessee of an airport terminal or an airport gate, the court shall consider, among other relevant factors, whether substantial harm will result to the airport operator or airline passengers as a result of the extension or the maintenance of a previously granted extension. In making the determination of substantial harm, the court shall consider, among other relevant factors, the level of actual use of the terminals or gates which are the subject of the lease, the public interest in actual use of such terminals or gates, the existence of competing demands for the use of such terminals or gates, the effect of the court's extension or termination of the period of time to assume or reject the lease on such debtor's ability to successfully reorganize under chapter 11 of this title, and whether the trustee of the affected air carrier is capable of continuing to comply with its obligations under section 365(d)(3) of this title.

(10) The trustee shall timely perform all of the obligations of the debtor, except those specified in section 365(b)(2), first arising from or after 60 days after the

order for relief in a case under chapter 11 of this title under an unexpired lease of personal property (other than personal property leased to an individual primarily for personal, family, or household purposes), until such lease is assumed or rejected notwithstanding section 503(b)(1) of this title, unless the court, after notice and a hearing and based on the equities of the case, orders otherwise with respect to the obligations or timely performance thereof. This subsection shall not be deemed to affect the trustee's obligations under the provisions of subsection (b) or (f). Acceptance of any such performance does not constitute waiver or relinquishment of the lessor's rights under such lease or under this title.

(e)(1) Notwithstanding a provision in an executory contract or unexpired lease, or in applicable law, an executory contract or unexpired lease of the debtor may not be terminated or modified, and any right or obligation under such contract or lease may not be terminated or modified, at any time after the commencement of the case solely because of a provision in such contract or lease that is conditioned on –

> (A) the insolvency or financial condition of the debtor at any time before the closing of the case;
>
> (B) the commencement of a case under this title; or
>
> (C) the appointment of or taking possession by a trustee in a case under this title or a custodian before such commencement.

(2) Paragraph (1) of this subsection does not apply to an executory contract or unexpired lease of the debtor,

whether or not such contract or lease prohibits or restricts assignment of rights or delegation of duties, if –

(A)(i) applicable law excuses a party, other than the debtor, to such contract or lease from accepting performance from or rendering performance to the trustee or to an assignee of such contract or lease, whether or not such contract or lease prohibits or restricts assignment of rights or delegation of duties; and

(ii) such party does not consent to such assumption or assignment; or

(B) such contract is a contract to make a loan, or extend other debt financing or financial accommodations, to or for the benefit of the debtor, or to issue a security of the debtor.

(f)(1) Except as provided in subsection (c) of this section, notwithstanding a provision in an executory contract or unexpired lease of the debtor, or in applicable law, that prohibits, restricts, or conditions the assignment of such contract or lease, the trustee may assign such contract or lease under paragraph (2) of this subsection; except that the trustee may not assign an unexpired lease of nonresidential real property under which the debtor is an affected air carrier that is the lessee of an aircraft terminal or aircraft gate if there has occurred a termination event.

(2) The trustee may assign an executory contract or unexpired lease of the debtor only if –

(A) the trustee assumes such contract or lease in accordance with the provisions of this section; and

(B) adequate assurance of future performance by the assignee of such contract or lease is provided, whether or not there has been a default in such contract or lease.

(3) Notwithstanding a provision in an executory contract or unexpired lease of the debtor, or in applicable law that terminates or modifies, or permits a party other than the debtor to terminate or modify, such contract or lease or a right or obligation under such contract or lease on account of an assignment of such contract or lease, such contract, lease, right, or obligation may not be terminated or modified under such provision because of the assumption or assignment of such contract or lease by the trustee.

(g) Except as provided in subsections (h)(2) and (i)(2) of this section, the rejection of an executory contract or unexpired lease of the debtor constitutes a breach of such contract or lease –

(1) if such contract or lease has not been assumed under this section or under a plan confirmed under chapter 9, 11, 12, or 13 of this title, immediately before the date of the filing of the petition; or

(2) if such contract or lease has been assumed under this section or under a plan confirmed under chapter 9, 11, 12, or 13 of this title –

(A) if before such rejection the case has not been converted under section 1112, 1208, or 1307 of this title, at the time of such rejection; or

(B) if before such rejection the case has been converted under section 1112, 1208, or 1307 of this title –

(i) immediately before the date of such conversion, if such contract or lease was assumed before such conversion; or

(ii) at the time of such rejection, if such contract or lease was assumed after such conversion.

(h)(1)(A) If the trustee rejects an unexpired lease of real property under which the debtor is the lessor and –

(i) if the rejection by the trustee amounts to such a breach as would entitle the lessee to treat such lease as terminated by virtue of its terms, applicable nonbankruptcy law, or any agreement made by the lessee, then the lessee under such lease may treat such lease as terminated by the rejection; or

(ii) if the term of such lease has commenced, the lessee may retain its rights under such lease (including rights such as those relating to the amount and timing of payment of rent and other amounts payable by the lessee and any right of use, possession, quiet enjoyment, subletting, assignment, or hypothecation) that are in or appurtenant to the real property for the balance of the term of such lease and for any renewal or extension of such rights to the extent that such rights are enforceable under applicable nonbankruptcy law.

(B) If the lessee retains its rights under subparagraph (A)(ii), the lessee may offset against the rent reserved under such lease for the balance of the term after the date of the rejection of such lease and for the term of any renewal or extension of such lease, the value of any damage caused by the nonperformance after the date of such rejection, of any obligation of the debtor under such lease, but the lessee shall not have any other right against the estate or the debtor on account of any damage occurring after such date caused by such nonperformance.

(C) The rejection of a lease of real property in a shopping center with respect to which the lessee elects to retain its rights under subparagraph (A)(ii) does not affect the enforceability under applicable nonbankruptcy law of any provision in the lease pertaining to radius, location, use, exclusivity, or tenant mix or balance.

(D) In this paragraph, "lessee" includes any successor, assign, or mortgagee permitted under the terms of such lease.

(2)(A) If the trustee rejects a timeshare interest under a timeshare plan under which the debtor is the timeshare interest seller and –

(i) if the rejection amounts to such a breach as would entitle the timeshare interest purchaser to treat the timeshare plan as terminated under its terms, applicable nonbankruptcy law, or any agreement made by timeshare interest purchaser, the timeshare interest purchaser under the timeshare plan may treat the timeshare plan as terminated by such rejection; or

(ii) if the term of such timeshare interest has commenced, then the timeshare interest purchaser may retain its rights in such timeshare interest for the balance of such term and for any term of renewal or extension of such timeshare interest to the extent that such rights are enforceable under applicable non-bankruptcy law.

(B) If the timeshare interest purchaser retains its rights under subparagraph (A), such timeshare interest purchaser may offset against the moneys due for such timeshare interest for the balance of the term after the date of the rejection of such timeshare interest, and the term of any renewal or extension of such timeshare interest, the value of any damage caused by the nonperformance after the date of such rejection, of any obligation of the debtor under such timeshare plan, but the timeshare interest purchaser shall not have any right against the estate or the debtor on account of any damage occurring after such date caused by such nonperformance.

(i)(1) If the trustee rejects an executory contract of the debtor for the sale of real property or for the sale of a timeshare interest under a timeshare plan, under which the purchaser is in possession, such purchaser may treat such contract as terminated, or, in the alternative, may remain in possession of such real property or timeshare interest.

(2) If such purchaser remains in possession –

(A) such purchaser shall continue to make all payments due under such contract, but may, offset against such payments any damages occurring after the date of the rejection of such contract caused by the nonperformance of any obligation of the debtor after such date, but such

purchaser does not have any rights against the estate on account of any damages arising after such date from such rejection, other than such offset; and

(B) the trustee shall deliver title to such purchaser in accordance with the provisions of such contract, but is relieved of all other obligations to perform under such contract.

(j) A purchaser that treats an executory contract as terminated under subsection (i) of this section, or a party whose executory contract to purchase real property from the debtor is rejected and under which such party is not in possession, has a lien on the interest of the debtor in such property for the recovery of any portion of the purchase price that such purchaser or party has paid.

(k) Assignment by the trustee to an entity of a contract or lease assumed under this section relieves the trustee and the estate from any liability for any breach of such contract or lease occurring after such assignment.

(*l*) If an unexpired lease under which the debtor is the lessee is assigned pursuant to this section, the lessor of the property may require a deposit or other security for the performance of the debtor's obligations under the lease substantially the same as would have been required by the landlord upon the initial leasing to a similar tenant.

(m) For purposes of this section 365 and sections 541(b)(2) and 362(b)(10), leases of real property shall include any rental agreement to use real property.

(n)(1) If the trustee rejects an executory contract under which the debtor is a licensor of a right to intellectual property, the licensee under such contract may elect –

(A) to treat such contract as terminated by such rejection if such rejection by the trustee amounts to such a breach as would entitle the licensee to treat such contract as terminated by virtue of its own terms, applicable nonbankruptcy law, or an agreement made by the licensee with another entity; or

(B) to retain its rights (including a right to enforce any exclusivity provision of such contract, but excluding any other right under applicable nonbankruptcy law to specific performance of such contract) under such contract and under any agreement supplementary to such contract, to such intellectual property (including any embodiment of such intellectual property to the extent protected by applicable nonbankruptcy law), as such rights existed immediately before the case commenced, for –

(i) the duration of such contract; and

(ii) any period for which such contract may be extended by the licensee as of right under applicable nonbankruptcy law.

(2) If the licensee elects to retain its rights, as described in paragraph (1)(B) of this subsection, under such contract –

(A) the trustee shall allow the licensee to exercise such rights;

(B) the licensee shall make all royalty payments due under such contract for the duration

of such contract and for any period described in paragraph (1)(B) of this subsection for which the licensee extends such contract; and

(C) the licensee shall be deemed to waive –

(i) any right of setoff it may have with respect to such contract under this title or applicable nonbankruptcy law; and

(ii) any claim allowable under section 503(b) of this title arising from the performance of such contract.

(3) If the licensee elects to retain its rights, as described in paragraph (1)(B) of this subsection, then on the written request of the licensee the trustee shall –

(A) to the extent provided in such contract, or any agreement supplementary to such contract, provide to the licensee any intellectual property (including such embodiment) held by the trustee; and

(B) not interfere with the rights of the licensee as provided in such contract, or any agreement supplementary to such contract, to such intellectual property (including such embodiment) including any right to obtain such intellectual property (or such embodiment) from another entity.

(4) Unless and until the trustee rejects such contract, on the written request of the licensee the trustee shall –

(A) to the extent provided in such contract or any agreement supplementary to such contract –

(i) perform such contract; or

(ii) provide to the licensee such intellectual property (including any embodiment of such intellectual property to the extent protected by applicable nonbankruptcy law) held by the trustee; and

(B) not interfere with the rights of the licensee as provided in such contract, or any agreement supplementary to such contract, to such intellectual property (including such embodiment), including any right to obtain such intellectual property (or such embodiment) from another entity.

(*o*) In a case under chapter 11 of this title, the trustee shall be deemed to have assumed (consistent with the debtor's other obligations under section 507), and shall immediately cure any deficit under, any commitment by the debtor to a Federal depository institutions regulatory agency (or predecessor to such agency) to maintain the capital of an insured depository institution, and any claim for a subsequent breach of the obligations thereunder shall be entitled to priority under section 507. This subsection shall not extend any commitment that would otherwise be terminated by any act of such an agency.